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[REDACTED]

FILE:

Office: MANILA, PHILIPPINES

Date: JAN 23 2008

IN RE:

Applicant:

[REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i).

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), Manila, Philippines, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, [REDACTED], is a native and citizen of the Philippines who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation. The applicant sought a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), which the OIC denied, finding the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the OIC*, dated December 23, 2005.

The AAO will first address the finding of inadmissibility.

In the appeal brief, counsel states that the applicant is not inadmissible under section 212(a)(6)(C) of the Act as he did not make a material misrepresentation. He states that the fact that [REDACTED] was married to a lawful permanent resident when he attempted to enter the United States in February 2001 was not material to his entry as a nonimmigrant and that it did not cut off a line of inquiry. Counsel states that [REDACTED] did not intend to remain in the United States beyond the authorized period of stay; he was to witness the birth of his child then return to the Philippines. Counsel states that the facts presented here are analogous to those in *Chryssikos v. Commissioner of Immigration*, 3 F.2d 372, 375 (2nd Cir. 1924), in which the court found that the government had not basis to exclude the entry of a Greek national who was married to a lawful permanent resident simply because of the marriage. Counsel states that in the case the court reasoned that although the applicant may have wanted to stay in the United States, the government provided no proof of her intent to stay. Counsel states that at secondary inspection [REDACTED] admitted that he was married and that he intended to stay in the United States for three months. He states that [REDACTED]'s telling the officer that he was going to visit his cousin, rather than his wife, was not a material misrepresentation because the fact that he was married did not make him excludable and did not cut off a line of inquiry. Counsel further asserts that even if [REDACTED] made a material misrepresentation, it had been timely retracted, and he cites to *Matter of M--*, 9 I&N Dec. 118 (BIA 1960) and *Matter of R--R--*, 3 I&N Dec. 823 (BIA 1949) in support of his assertion.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The elements of a material misrepresentation are set forth in *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960; AG 1961) as follows:

A misrepresentation made in connection with an application for visa or other documents, or with entry into the United States, is material if either:

1. the alien is excludable on the true facts, or
2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

The inspector's report is summarized as follows. The subject arrived at Detroit Metro Airport on February 26, 2001 and applied for admission into the United States as a visitor with a valid passport and B1/B2 visa. The subject stated that he was coming to visit his cousin in Georgia for three months. Because the subject had departed from the United States on January 14, 2001 after having been in the country for six months, he was referred to secondary inspection. "During secondary inspection it was revealed that the subject was going to visit his wife in Georgia. A telephone call was placed to the subject[']s "cousin", and it was revealed that [REDACTED] was the subject[']s wife." The subject stated that he would have trouble entering the United States if he stated that [REDACTED] was his wife and was living in the United States. The subject indicated on his visa application that he was single. During his last trip to the United States the subject and his wife moved into an apartment and opened a joint bank account, and the subject received a credit card.

The Record of Sworn Statement has the following questions and answers that are relevant here.

Q. Are any of your immediate relatives in the United States . . . ?

A. My wife.

Q. What is the purpose of your trip to the United States today?

A. To visit my wife.

Q. Where is your wife?

A. In Georgia.

Q. You stated that you were going to visit your cousin [REDACTED] in Georgia. Is [REDACTED] you [sic] cousin?

A. No, she is my wife.

Q. Why did you tell me she was your cousin?

A. If I tell you she is my wife, you would disapprove my entering the U.S. My visa says I'm single.

Q. Have you ever been to the U.S. before?

A. Yes, from July 05, 2000 until January 04, 2001

Q. What was the purpose of your last trip to the U.S.?

A. To visit my wife.

Q. How long do you plan on staying in the U.S. on this trip?

A. Three months.

Q. Do you currently work anywhere?

A. A seaman in the Philippines[.]

Q. When is the last time you worked as a seaman in the Philippines?

A. In 1999.

Q. Do you have any U.S.[.] ID?

A. A Georgia drivers license.

Q. Do you have a bank account in the U.S.?

A. Yes, a joint account with my wife.

Q. Do you have a residence in the U.S.?

A. My wife and I have an apartment in Georgia.

In paragraph five of the declaration by the applicant's wife, she states that in "June of 2000, I went to the Philippines and [REDACTED] and I were married." She states that after they married, "[REDACTED] and I came back to the United States in July of 2000. [REDACTED] accompanied me. He stayed the six months that was allowed for him to stay." In paragraph eight she states that she received a call from the officer. She states that "[t]he first thing the officer asked me was whether I was [REDACTED]'s wife. I told him that I was." *Declaration dated April 27, 2005 from the applicant's wife.*

The April 25, 2005 letter from counsel states that the applicant was issued a tourist visa from the United States embassy on March 9, 2000, which was issued three months prior to his marriage to his present wife.

The AAO finds the facts presented here are dissimilar to those in *Chryssikos* unpersuasive. In *Chryssikos*, a month prior to her arrival at Ellis Island the relator was married in Italy, and arrived in the United States accompanied by her husband, who was also a Greek by birth. However, the relator's husband had made an affidavit before leaving the United States stating that it was his intention to go to Greece to marry and bring his wife here for a temporary visit of six months. Here, because the applicant misrepresented not only his intent in coming to the United States, but his marital status as well, *Chryssikos* is not persuasive in establishing [REDACTED]'s admissibility. When the applicant made these misrepresentations, they were material as they tended to shut off a line of inquiry which is relevant to his eligibility and which might well have resulted in a proper determination that he be excluded.

Counsel cites to *Matter of M--* and *Matter of R--R--* to establish that the applicant made a voluntary and timely retraction of the material misrepresentations. In *Matter of M--*, the BIA stated that:

[T]he respondent in his statement to the immigration officer attempted to establish that he was an alien lawfully residing in the United States. However, prior to the completion of the statement he volunteered that he had entered the United States unlawfully.

The court found that "[t]he respondent voluntarily and prior to any exposure of the attempted fraud corrected his testimony that he was an alien lawfully residing in the United States."

Matter of M--, relied on by counsel, is distinguishable as the alien there recanted false testimony prior to completing his statement. *Id.* at 119. Here, the record shows that the applicant completed the false testimony about his intention in coming to the United States to the immigration inspection at the primary inspection.

In *Matter of R--R--*, the BIA found the applicant was not inadmissible for perjury. It stated of the applicant that:

When applying for admission to the United States on October 30, 1945, he claimed to be a citizen of the United States and exhibited a birth certificate of a younger brother, the dates on the certificate having been altered. He executed a certificate before the inspector alleging he

was his brother and a citizen by birth in the United States. Right after executing this affidavit appellant admitted to the primary inspector that he had lied. On page 8 of the Board of Special Inquiry hearing of October 31, 1945, the following appears:

Q. How did the inspector who examined you yesterday learn that you had lied to him?

A. He asked me for identification and I showed him the papers that you have entered in the record as exhibits. They were all in my wallet. After he saw these papers, he asked if I had told him any lies and I admitted that I had. . . .

At the Board of Special Inquiry hearing the appellant told the truth at all times. Reading the question and answer quoted above, it would appear that the appellant voluntarily and without knowledge coming to the inspector through other means admitted the falsity of his prior assertion of birth in the United States. The Service pointed to the fact that appellant is not entitled to plead reasonable retraction because of testimony given by appellant at a Board of Special Inquiry on November 1, 1946. There appellant testified that the inspector noted that the birth date on the certificate of birth presented in the 1945 hearing had been altered, and, as a consequence, the appellant admitted the falseness of his claim. It would seem, then, that the issue becomes rather close.

However, we feel that the hearing accorded appellant in 1945, at the time the false swearing occurred, might well be accepted as representing what transpired at that time, and according to the 1945 hearing, the retraction of the false swearing by appellant was purely voluntary. Even in connection with the testimony at the hearing on November 1, 1946, we have no evidence that the primary inspector had, in fact, detected a fraud. . . .

We have held that where an alien, in an immigration proceeding, testifies falsely under oath as to a material fact, but voluntarily and without prior exposure of his false testimony, comes forward and corrects his testimony, perjury has not been committed. This ruling follows that in the *Matter of W----*, 56107/923 (1942). In the *Norris* case he attempted to correct his testimony only after the falsity of his statements was exposed through the testimony of a Government witness. We are inclined to hold that the testimony in the case now before us falls squarely within the purview of previous holdings cited by the Service. It seems clear to us that appellant voluntarily and prior to the exposure of the attempted fraud, corrected any statements or impression he may have given the primary inspector with respect to his place of birth and the birth certificate (*Matter of G----*, 6591236 (Apr. 10, 1947)). Applying these holdings to this case, we conclude that the offense of perjury, not being completed, appellant is not inadmissible as one who admits the commission thereof.

Id. at 826-827.

The AAO finds the facts in *Matter of R--R-* distinguishable from those presented here. In *Matter of R--R-* the alien appellant admitted to the primary inspector that he had lied. Here, the applicant did not immediately and voluntarily admit to the primary inspector that he lied about his intent in coming to the United States. Because the primary inspector suspected the applicant's intent in coming to the country, he was referred to secondary inspection for further questioning. It was during the secondary inspection that it was revealed that

the applicant was going to visit his wife in Georgia. Thus, the facts here are dissimilar from those in *Matter of R--R-* where the BIA found that the alien had not committed perjury.

The record provides substantial evidence to support the OIC's determination that the applicant sought to procure admission by a willful misrepresentation of a material fact: his true intention in coming to the United States. Thus, the AAO finds the applicant inadmissible under section 212(a)(6)(C)(i) of the Act.

The AAO will now address the finding that the grant of a waiver of inadmissibility is not warranted.

Section 212(i) of the Act provides that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

A section 212(i) waiver of the bar to admission resulting from violation of section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant and his children are not a consideration under the statute, and unlike section 212(h) of the Act where a child is included as a qualifying relative, they are not included under section 212(a)(9)(B) of the Act. Thus, hardship to the applicant and his children will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant's U.S. citizen wife. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

On appeal, counsel states that the Foreign Affairs Manual requires that a humanitarian approach be used in determining whether to apply the misrepresentation bar. He states that the [REDACTED] have two U.S. citizen children; Ian, the oldest child, lives in the United States with his mother and the youngest child, [REDACTED] who has severe asthma, lives in the Philippines with the applicant. He states that Ian is almost four years old and [REDACTED] is one and a half years old. Counsel states that [REDACTED] is not able to care for the youngest child because she works to support the children and [REDACTED]. He states that the couple recently purchased a house with the hope that the applicant's income would enable them to afford the mortgage. Counsel states that keeping in touch with the applicant is costly for [REDACTED]. He states that Ian attends school during the day and is cared for by friends at night when [REDACTED] is working and that [REDACTED] no longer works as a seaman so that he can stay home and take care of [REDACTED]. Counsel states that separating the children from a nurturing parent and each other constitutes extreme hardship. He states that if the waiver application were denied, [REDACTED] must choose between the life she always dreamed of in the United States and a life in the Philippines with her husband. Counsel asserts that because [REDACTED] has no other means of adjusting status, this weighs in favor of finding extreme hardship, as stated in *Matter of Ige*.

The record contains, among other documents, medical records, employment letters, a marriage certificate, bank statements, photographs, a declaration, birth certificates, invoices, wage statements, and a construction contract entered into by [REDACTED] and Creative Structures, a Georgia General Partnership.

The medical records convey that [REDACTED] born on September 28, 2003, was treated for acute severe asthma, pneumonia with asthma, and bronchial asthma in the Philippines in 2004.

In the January 6, 2006 letter, [REDACTED] states that she cares for [REDACTED]'s son during weekends and nights when day care centers are closed and [REDACTED] has to work. She states that [REDACTED] drives 30 minutes each way to her house.

In the January 10, 2006 letter, [REDACTED] states that she cares for [REDACTED] while [REDACTED] works the night shift.

The declaration by [REDACTED] states that she came to the United States in 1993 as a nurse and that she married the applicant in June of 2000. She states that it is impossible to move to the Philippines given its economic situation. She states that she desires for her children to be raised in the United States. She states that she is the sole bread-winner in the family and sends \$300 to \$500 home every month, depending on her ability to pay and the family's needs. She states that it is economically difficult to maintain two households and that the construction of their home in Georgia is nearly complete. [REDACTED] states that five years of family separation has been harsh and debilitating; her children have never played together, and it is no way to raise children or to have a marriage. She states that the children need both parents. She states that her youngest son's asthma is not helped by the humidity in the Philippines and that he would do much better in the United States. She states that her children should enjoy all the benefits of being an American citizen. [REDACTED] states that without her husband to help her raise both of their children together, their lives are disjointed.

The record contains a listing of [REDACTED] monthly household expenses, which totals \$2,636.57, and it shows her monthly salary as \$2,712.31.

The wage statement for November 1, 2006 to November 15, 2006 shows earnings of \$1,499.23. The wage statement for November 16, 2005 to November 30, 2005 shows earnings of \$1,213.08; this statement does not include the shift or weekend differential.

The record shows the monthly mortgage loan payment for [REDACTED] is \$1,534.84. It shows Ms. [REDACTED] has credit card debt of about \$19,000.

The AAO has considered all of the evidence in rendering this decision.

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). The BIA in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health,

particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* at 565-566. The BIA indicated that these factors relate to the applicant's "qualifying relative." *Id.* at 565-566.

In *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

Applying the *Cervantes-Gonzalez* here, extreme hardship to the applicant's wife must be established in the event that she joins the applicant; and in the alternative, that she remains in the United States. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The applicant fails to establish that his wife would endure extreme hardship if she remained in the United States without him.

Although [REDACTED] states that she will not be able to afford the monthly mortgage payment without the applicant's earnings, the record shows that her income as a nurse is sufficient to support two households.

With regard to family separation, courts in the United States have stated that "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted).

However, the fact that the applicant has a U.S. citizen children is not sufficient, in itself, to establish extreme hardship. The birth of a U.S. citizen child is not per se extreme hardship. *Matter of Correa*, 19 I&N Dec. 130 (BIA 1984). In *Marquez-Medina v. INS*, 765 F.2d 673 (7th Cir. 1985), the Seventh Circuit stated that an illegal alien cannot gain a favored status merely by the birth of a citizen child. The Ninth Circuit has found that an alien illegally present in the United States cannot gain a favored status merely by the birth of his citizen child. *Lee v. INS*, 550 F.2d 554 (9th Cir. 1977). In *Banks v. INS*, 594 F.2d 760 (9th Cir. 1979), the Ninth Circuit found that an alien, illegally within this country, cannot gain a favored status on the coattails of his (or her) child who happens to have been born in this country.

Furthermore, in *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it "was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission." (citing *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir. 1980) (severance of ties does not constitute extreme hardship). In *Shoostary v. INS*, 39 F.3d 1049 (9th Cir. 1994), the court upheld the finding of no extreme hardship if Shoostary's lawful permanent resident wife and two U.S. citizen

children are separated from him. *Id.* 1050-1051. As stated in *Perez v. INS*, 96 F.3d 390, 392 (9th Cir. 1996), “[e]xtreme hardship” is hardship that is “unusual or beyond that which would normally be expected” upon deportation and “[t]he common results of deportation or exclusion are insufficient to prove extreme hardship.” (citing *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir.1991)). In *Sullivan v. INS*, 772 F.2d 609, 611 (9th Cir. 1985), the Ninth Circuit stated that deportation is not without personal distress and emotional hurt.

conveys that family separation has been harsh and debilitating. The AAO is mindful of and sympathetic to the emotional hardship that is undoubtedly endured as a result of separation from a loved one. After a careful and thoughtful consideration of the record, however, the AAO finds that the situation of Ms. , if she remains in the United States, is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship as defined by the Act. The record before the AAO is insufficient to show that the emotional hardship, which certainly will be experienced by the applicant’s wife, is unusual or beyond that which is normally to be expected upon removal. See *Hassan, Shooshtary, Perez, and Sullivan, supra*.

The present record is insufficient to establish that the applicant’s wife would endure extreme hardship if she joined the applicant in the Philippines.

Although the record conveys that the ’s son has been treated for acute severe asthma, pneumonia with asthma, and bronchial asthma in the Philippines in 2004, it does not establish that his condition is aggravated by living in the Philippines.

states that returning to the Philippines is impossible given its economic situation. However, no documentation has been produced to show that would be unable to find employment as a nurse in the Philippines. Furthermore, difficulties in finding employment do not constitute extreme hardship. See, e.g., *Carnalla-Munoz v. INS*, 627 F.2d 1004, 1006 (9th Cir. 1980) (upholding the BIA’s finding that hardship in finding employment in Mexico and in the loss of group medical insurance did not reach extreme hardship); *Pelaez v. INS*, 513 F.2d 303 (5th Cir. 1975) (difficulty in obtaining employment in the Philippines is not extreme hardship); and *Marquez-Medina v. INS*, 765 F.2d 673, 677 (7th Cir. 1985) (the loss of a job along with its employee benefits is not extreme or unique economic hardship, but is a normal occurrence when an alien is deported.)

In considering the hardship factors raised here, the AAO examines each of the factors, both individually and cumulatively, to determine whether extreme hardship has been established. It considers whether the cumulative effect of claims of economic and emotional hardship would be extreme, even if, when considered separately, none of them would be. It considers the entire range of factors concerning hardship in their totality and then determines whether the combination of hardships takes the case beyond those hardships ordinarily associated with removal.

In the final analysis, the AAO finds that the requirement of significant hardships over and above the normal economic and social disruptions involved in removal has not been met so as to warrant a finding of extreme hardship. Having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that these factors do not in this case constitute extreme hardship to a qualifying family member for purposes of relief under 212(i) of the Act, 8 U.S.C. § 1182(i).

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.